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Human rights bodies and mechanisms

Free, prior and informed consent: a human rights-based approach

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

The Expert Mechanism on the Rights of Indigenous Peoples carried out the present study on a human rights-based approach to free, prior and informed consent in accordance with its mandate under Human Rights Council resolution 33/25.

The study concludes with Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent.

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I. Introduction

1. In accordance with its mandate under Human Rights Council resolution 33/25, at its tenth session, held in July 2017, the Expert Mechanism on the Rights of Indigenous Peoples decided to produce a study on free, prior and informed consent, as it appears in several provisions of the United Nations Declaration on the Rights of Indigenous Peoples. For this purpose, the Expert Mechanism held a seminar in Santiago on 5 and 6 December 2017. The present study was informed by presentations shared at the seminar and submissions by Member States, indigenous peoples, national human rights institutions, academics and others.[1]

2. The study seeks to contribute to an understanding of free, prior and informed consent in the context of developing practices and interpretations of this human rights norm enshrined in the Declaration. Taking into account 11 years of advocacy and jurisprudence following the adoption of the Declaration, the present study is not intended to be either exhaustive or definitive, but should contribute to the body of interpretative guidance now available to States, indigenous peoples and others working on issues of concern to indigenous peoples.

II. Human rights basis of free, prior and informed consent

3. Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples (see A/HRC/9/9, para. 86), as shown in the following sections.

4. Consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land,[2] even if they have often been dishonoured.[3] Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world.

5. Yet, as Special Rapporteur Miguel Alfonso Martínez concluded in his final report, the process of negotiation and seeking consent inherent in treaty-making is the most suitable way not only of securing an effective contribution from indigenous peoples to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous

[1] All the submissions are available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx.

[2] E.g., Treaty No. 6 between the Cree and other Nations with the British Crown, in 1876, made reference to the requirement for "consent" in paragraph 3, as did article 16 of the 1868 Treaty of Fort Laramie between the United States of America and the Oceti Sakowin States.

[3] *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

issues at all levels with indigenous free and educated consent (see E/CN.4/Sub.2/1999/20, para. 263). He also referred to a widespread desire of indigenous peoples to establish a solid, new and different kind of relationship — quite unlike the almost constantly adversarial, often acrimonious relationship they had always had — with the non-indigenous sector of society in countries where they coexisted (ibid., para. 262). In this context, the standards for free, prior and informed consent articulated in the Declaration are particularly important to indigenous peoples' relationships with States today and going forward.

A. Self-determination

6. The right to self-determination is the fundamental human right upon which free, prior and informed consent is grounded. It includes internal and external aspects.[4] Historically, the right to self-determination, which is rooted in the decolonization movement, was devised to ensure subjected nations and peoples could recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.[5] The right to self-determination was indeed construed as a pillar right, including other rights of peoples and nations to be free from coercion of any sort, to live in dignity and to enjoy all rights equally, including the right to be responsible for their futures, to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programmes and proposals that affected them or their resources.

7. The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not therefore new in international human rights law.[6] These concepts derive from the elements of the right to self-determination, on which the Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples.

8. The international legal framework that conceptualized the right to self-determination paid particular attention to peoples and nations recovering control over their lands and natural resources as an important constituent element of the right to self-determination.[7] It is for this reason that free, prior and informed consent is of particular relevance to lands and resources.

B. Non-discrimination

9. Free, prior and informed consent is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against indigenous peoples. The Doctrine of Discovery,[8] along with other doctrines of conquest that justified the legal and policy framework for dispossessing indigenous peoples of their lands and annihilating their cultures, was based on racial theories and principles that considered indigenous peoples as inferior beings who could not possibly own lands and decide their own futures. The international indigenous rights movement in the 1960s and 1970s highlighted systemic racial discrimination and human rights violations faced by indigenous peoples, prompting a study on the issue by the Sub-Commission on Prevention of

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[4] See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995).

[5] See General Assembly resolution 1514 (XV).

[6] See General Assembly resolution 1803 (XVII); and Nicolaas Schrijver, "Self-determination of peoples and sovereignty over natural wealth and resources" in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1).

[7] See Marion Mushkatt, "The process of decolonization: international legal aspects", *University of Baltimore Law Review*, vol. 2, No. 1 (Winter 1972).

[8] See the recommendations of the Permanent Forum on Indigenous Issues following its discussion on "The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests" (see E/2012/43-E/C.19/2012/13).

Discrimination and Protection of Minorities.[9] This eventually led to the elaboration of the Declaration, as a dual framework combining remedial rights with ongoing rights.

10. As early as 1997, 10 years before the adoption of the Declaration by the General Assembly, the Committee on the Elimination of Racial Discrimination concluded that racial discrimination constituted the main underlying cause of most discrimination suffered by indigenous peoples. It affirmed that discrimination against indigenous peoples fell under the scope of the Convention and that all appropriate means had to be taken to combat and eliminate such discrimination.[10] The Committee pointed specifically at "consent" as a human rights norm seeking to negate false doctrine and dismantle conceptual structures that dispossessed and disempowered indigenous peoples. It called upon States to ensure that members of indigenous peoples had rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests were taken without their informed consent.[11] It also called upon States to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they had been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[12]

III. Free, prior and informed consent as a human rights norm

A. Rationale

11. Free, prior and informed consent as provided for in the Declaration has three major rationales. First, it seeks to restore to indigenous peoples control over their lands and resources, as specified in article 28. Some authors argue that, "free, prior and informed consent has its origins in the native title principle, according to which native people have their right to lands based on their customary law and sustained connection with the land",[13] and others that "historical legal doctrine firmly establishes indigenous peoples' sovereign rights over ancestral lands and resources as a matter of long-standing international law".[14] Second, the potential for free, prior and informed consent to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Indigenous peoples' cultural heritage, including human remains, taken without consent, are still held by others. Third, free, prior and informed consent has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties (see A/HRC/EMRIP/2010/2), as reflected in articles 18 and 19 of the Declaration.

B. Nature of free, prior and informed consent as a human rights norm

12. The Declaration recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of indigenous rights is inherent in indigenous culture and serves as a bulwark against disappearance by forced assimilation.

13. Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of indigenous peoples. Therefore, it cannot be held or exercised by

[9] See "Martínez Cobo Study" (E/CN.4/Sub.2/476 and Add.1–5; E/CN.4/Sub.2/1982/2 and Add.1–7; and E/CN.4/Sub.2/1983/21 and Add.1–7).

[10] See Committee on the Elimination of Racial Discrimination general recommendation No. 23 (1997) on the rights of indigenous peoples.

[11] Ibid.

[12] Ibid.

[13] See MacInnes, Colchester and Whitmore submission.

[14] S. James Anaya, "Divergent discourses about international law, indigenous peoples, and rights over lands and natural resources: toward a realist trend", *Colorado Journal of International Environmental Law and Policy* (Spring 2005).

individual members of an indigenous community. The Declaration provides for both individual and collective rights of indigenous peoples. Where the Declaration deals with both individual and collective rights, it uses language that clearly distinguishes "indigenous peoples" from "individuals". Understandably, however, none of the provisions of the Declaration dealing with free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32) make any reference to individuals. To "individualize" these rights would frustrate the purpose they are supposed to achieve.[15]

C. Scope of free, prior and informed consent

1. Free, prior and informed consent: rights to consultation, participation and to lands and resources

14. Free, prior and informed consent is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.

15. States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective (see A/HRC/18/42, annex, para. 9). The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up. Use in the Declaration of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard (see A/HRC/18/42). It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.

16. Former Special Rapporteur on the rights of indigenous peoples James Anaya underscored that the Declaration suggests a heightened emphasis on consultations that are in the nature of negotiations towards mutually acceptable arrangements prior to decisions on proposed measures, rather than mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process (A/HRC/12/34, para. 46). Consultation will also often be the starting point for seeking free, prior and informed consent.

17. The right of indigenous peoples to participate in decision-making is provided for separately in article 18 of the Declaration, a provision grounded in article 25 of the International Covenant on Civil and Political Rights, which guarantees every citizen's right to "take part in the conduct of public affairs". The Declaration adapts this general right to participation to the needs and circumstances of indigenous peoples by seeking to achieve two objectives: first, to correct de jure and de facto exclusion of indigenous peoples from public life or decision-making processes owing to many factors, including prejudiced views against them, a low level of education, difficulties in obtaining citizenship or identification documents and non-participation in electoral processes and political institutions; and, second, to revitalize and restore indigenous peoples' own decisions-making and representative institutions that have either been disregarded or abolished. These institutions should be recognized, revitalized and given opportunities to participate in decision-making.

18. The Human Rights Committee has also elaborated on indigenous peoples' right to participate in a way that goes beyond consultation, noting that participation in the decision-making process must be "effective".[16] The supervisory bodies of the International Labour Organization (ILO) have underlined the interconnection between consultation and

[15] See Siegfried Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", *Harvard Human Rights Journal*, vol. 12 (1999).

[16] See *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006), para. 7.6.

participation.[17] Participation connotes more than mere consultation and should include the development of initiatives by indigenous peoples. "In this sense, the intertwined concepts of consultation and participation are mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development".[18]

19. The rights of indigenous peoples over their lands, resources and territories are also integral parts of free, prior and informed consent, as construed in the Declaration. The right to "own, use, develop and control" the lands, territories and resources (art. 26) gives rise to a right to free, prior and informed consent consistent with indigenous peoples' right of self-determination. In this regard, the role of free, prior and informed consent is to safeguard indigenous peoples' cultural identity, which is inextricably linked to their lands, resources and territories.

2. Constituent elements of free, prior and informed consent

20. As affirmed in the Declaration, decisions to grant or withhold consent must be free. The term "free" is understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur or the legitimacy of the consultation process may be called into question:

(a) The context or climate of the process should be free from intimidation, coercion, manipulation (see A/HRC/18/42, annex, para. 25) and harassment, ensuring that the consultation process does not limit or restrict indigenous peoples' access to existing policies, services and rights;

(b) Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization (see A/HRC/39/17), violence towards indigenous peoples or prejudiced views towards them;

(c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference;

(d) Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue;

(e) Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.

21. Any free, prior and informed consent process must also be prior to any other decisions allowing a proposal to proceed and should begin as early as possible in the formulation of the proposal. The Inter-American Court of Human Rights in *Saramaka People v. Suriname* (2007) (the *Saramaka* case) uses the terms "early stage" and "early notice". To that end, the "prior" component of free, prior and informed consent should entail:

(a) Involving indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not

[17] See ILO Committee of Experts on the Application of Conventions and Recommendations, general observation on indigenous and tribal peoples (observation 2010/81).

[18] See International Labour Organization, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* (Geneva, 2013), p. 19.

launched at a late stage in a project's development, when crucial details have already been decided;

(b) Providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes (see A/HRC/18/42, annex, para. 25).

22. Consultation in the free, prior and informed consent context should be "informed", implying that:

(a) The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear;

(b) The information should be presented in a manner and form understandable to indigenous peoples, including translation into a language that they understand. Consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organization of the indigenous peoples concerned (see A/HRC/18/42). The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity (see E/C.19/2005/3); the reasons for the project; the areas to be affected; social, environmental and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity;[19]

(c) Adequate resources and capacity should be provided for indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the indigenous peoples of their rights in general — prior or parallel to the process of consultation. For example, the Australian Referendum Council recommended that the Government of Australia consider proposals designed by Aboriginal and Torres Strait Islander peoples during 13 regional dialogues and a national indigenous constitutional convention in May 2017 calling for a new First Nations representative public institution called "Voice to Parliament" based on articles 18 and 19 of the Declaration.[20] In two cases (*Finmark Estate Agency v. Nesseby regional society* (the *Unjárga* case) and *Norway v. Jovsset Ánte Iversen Sara* (the *Sara* case)), the Supreme Court of Norway referred to the consent and participation of the Sami Parliament as support for its decision that national legislation was in accordance with international law on indigenous rights, including the Declaration, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).[21] However, in the Sara case, the Court referred to the participation of the Sami Parliament as support for its decision, although consent was not achieved. It is a concern if participation is used as support for State decisions where consent is not achieved, as this could discourage indigenous peoples from participating in decision-making processes.

23. Failure to engage with legitimate representatives of indigenous peoples can undermine any consent received. In the Declaration it is clear that States and third parties should consult and cooperate with indigenous peoples "through their own representative institutions" (arts. 19 and 32) and "in accordance with their own procedures" (art. 18). All parties should ensure representation from women, children,[22] youth and persons with disabilities, and efforts should be made to understand the specific impacts on them (see

[19] United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, *Guidelines on Free, Prior and Informed Consent* (Geneva, 2013).

[20] See www.referendumcouncil.org.au/final-report.

[21] See www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-collecetive-rights-of-use-to-land-in-nesseby-finnmark/ and www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf.

[22] The Committee on the Rights of the Child in its general comment No. 11 (2009) on indigenous children and their rights under the Convention notes that the right of the child to be heard includes the right to representation.

A/HRC/18/42). Yet, identifying the legitimate representatives of indigenous peoples can be challenging. States should be mindful of situations where indigenous peoples' decision-making institutions have been undermined by colonialism and where communities have been dispersed, dispossessed of land or relocated, including to urban areas. These situations may require State assistance to rebuild indigenous peoples' capacity to represent themselves appropriately. It is important for States or third parties to ensure that institutions supporting indigenous peoples and claiming to represent them are so mandated.

D. Consent

24. As former Special Rapporteur James Anaya has stated, consent is not a freestanding device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a "yes" to a predetermined decision (A/HRC/24/41, para. 30). This means that consent can only be received for proposals when it fulfils the three threshold criteria of having been free, prior and informed, and is then evidenced by an explicit statement of agreement.

25. Consent is a key principle that enables indigenous peoples to exercise their right to self-determination, including development that involves control over or otherwise affects their lands, resources and territories. With such an understanding, indigenous peoples are considered to engage with and are entitled to give or withhold consent to proposals that affect them.

26. Indigenous peoples' decision to give or withhold consent is a result of their assessment of their best interests and that of future generations with regard to a proposal. When they give their consent it provides an important social licence and a favourable environment to any actor operating on and around their lands, territories and resources, as many studies and research have shown, including by the private sector.[23] Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons:

(a) They may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. Arguments of whether indigenous peoples have a "veto" in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept;

(b) Indigenous peoples may withhold consent temporarily because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the consent to be free, prior and informed. Indigenous peoples may seek adjustment or amendment to the proposal, including by suggesting an alternative proposal;

(c) Withholding consent can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, arrested and even being killed for resisting "trap-like" consultation offers are numerous.

27. Withholding consent can be a positive mechanism for democratic and inclusive governance. It can be of critical importance to the ultimate success of a proposal or project. Indigenous peoples' consent should be given "in accordance with international human rights standards" (Declaration, art. 34) and particular attention should be paid "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities", including in the elimination of all forms of discrimination and violence against indigenous children and women (ibid., art. 22).

[23] Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge Research in Human Rights Law (London and New York, Routledge, 2014), chap. 5.

28. In any event, a number of countries and stakeholders have endorsed a policy not to proceed if indigenous peoples withhold their consent. The United Nations Global Compact, in its business reference guide on the Declaration,[24] advises its members not to proceed with a project after the withholding of consent by indigenous peoples. A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples moves into a legal grey area and exposes itself to judicial review and other types of recourse mechanisms, potentially including international, regional and national tribunals, and by indigenous peoples' own institutions (see paras. 38–41 below);

29. Particular caution should be exercised regarding indigenous peoples in voluntary isolation or of recent contact, including the non-imposition of contact and the obligation to protect their territories, natural resources and lives. In the case of indigenous peoples in voluntary isolation, the decision and expression not to be in contact or not to have constant interaction with other societies and the Government can be an expression of non-consent. States should respect their will and are obliged to protect their lives through the protection of their territories and natural resources.[25]

30. If indigenous peoples choose to give their consent to a project, consent should be consistent with indigenous peoples' own laws, customs, protocols and best practices, including representation by legal counsel whenever possible and as required by law. In many, if not all, instances, consent must be recorded in a written instrument, negotiated by the parties, and signed affirmatively by a legitimate authority or leader of the relevant indigenous peoples, which may include more than one group (see paras. 42–45 below). Full understanding by indigenous peoples must be ensured and additional measures should be taken by the State in cases involving indigenous peoples of recent contact.

E. Operationalization of free, prior and informed consent

1. When is free, prior and informed consent required?

31. The Declaration contains five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply. Free, prior and informed consent may be required for adoption and implementation of legislative or administrative measures[26] and any project affecting indigenous peoples' lands, territories and other resources, within the context referred to in the paragraphs below (arts. 19 and 32). It is also required in instances of relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (arts. 10 and 29).[27]

32. The role of free, prior and informed consent in the realm of natural resource development is set out in article 32 of the Declaration. This provision is particularly important given the well-known risks and impacts of extractive industries on indigenous peoples (see A/HRC/24/41, A/HRC/21/52 and A/HRC/21/55). As stated by James Anaya, the general rule in the case of extractive industries' projects within the territories of indigenous peoples is that the free, prior and informed consent of indigenous peoples is required. Indigenous peoples' consent may also be required when extractive activities

[24] See www.unglobalcompact.org/library/541.

[25] See http://periodicos.unb.br/index.php/ling/article/view/26661 (in Portuguese).

[26] Many indigenous peoples suggest that social development programmes often have an impact on their customary laws, traditions and customs, including cultural, intellectual, religious and spiritual property for which free, prior and informed consent should be obtained (cf., Declaration, art. 11, para. 2; see also http://iphrdefenders.net/statement-asia-indigenous-peoples-pact-asia-indigenous-peoples-caucus-agenda-4-study-advice-free-prior-informed-consent/.)

[27] Article 29 of the Declaration is the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides and review of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights (see A/HRC/24/41).

2. The proportionality principle

33. In several articles, the Declaration calls for free, prior and informed consent regarding matters, projects or issues that "affect" indigenous peoples. This concept is not limited to matters that affect indigenous peoples exclusively. To the contrary, matters of broad societal application "may affect indigenous peoples in ways not felt by others in society" (see A/HRC/12/34, para. 43). Measures and projects considered to "affect" indigenous peoples to the extent that free, prior and informed consent will be required under articles 19 and 32 include matters of "fundamental importance to their rights, survival, dignity and well-being" (A/HRC/21/55, para. 27). Relevant factors in this assessment include: the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities[28] and historical inequities faced by the indigenous peoples concerned (see A/HCR/18/42 and A/HRC/21/55).

34. The perspective of the indigenous peoples concerned on the potential broader impact of a decision is the starting point for assessing whether a legislative or administrative measure or any project affecting their lands or territories and other resources affects them (see A/HCR/18/42). Indigenous peoples should have a major role in establishing whether the measure or project affects them at all and, if it does, the extent of the impact. Indigenous peoples may highlight possible harms that may not be clear to the State or project proponent, and may suggest mitigation measures to address those harms.

35. As to impact, if a measure or project is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resources then consent is required (see A/HRC/12/34, para. 47). It has been referred to as a "sliding scale approach" to the question of indigenous participatory rights, which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question.[29] This view is supported by the Human Rights Committee,[30] which uses the language "substantive negative impact", and the Committee on Economic, Social and Cultural Rights. Both have linked the issue of free, prior and informed consent to the nature and the effects that a proposed initiative will have on indigenous peoples' rights in the respective human rights treaty: an approach in line with the jurisprudence of the Inter-American Court of Human Rights[31] and the African Commission on Human and Peoples' Rights.[32] Assessment of the impact requires consideration of the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community's cultural integrity.

36. Other projects requiring free, prior and informed consent and tending to have "adverse impacts" as defined by International Finance Corporation Performance Standard 7, include projects located on lands, or natural resources on lands, subject to traditional ownership or under customary use; and projects significantly impacting on critical cultural heritage of indigenous peoples or using cultural heritage, including knowledge, innovation or practices for commercial purposes.[33]

37. A number of domestic court decisions support these principles. An expansive view of consent was recently taken by the Supreme Court of Canada in the case of *Tsilhqot'in Nation v. British Columbia* (2014). The Court decided that once the right of an indigenous

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[28] See *Saramaka* case.

[29] Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, International Studies in Human Rights, vol. 102 (Brill/Nijhoff, 2009), p. 113.

[30] See *Länsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru*.

[31] See *Saramaka* case.

[32] See *Centre for Minority Rights Development v. Kenya*, 276/03 (the *Endorois* case).

[33] See Performance Standard 7 (2012) on Indigenous Peoples; and Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources*, chap. 5.

community to control a portion of land has been recognized, no use of that land will be permitted without the consent of that community.[34] The Constitutional Court of Colombia recognizes three situations in which consent is mandatory: displacement of indigenous peoples; the storage of toxic waste; and when the existence of the group is put at risk.[35] The Constitutional Court of the Plurinational State of Bolivia has recognized similar situations as warranting consent, as established by the Inter-American Court of Human Rights.[36] The need for consent in the case of large-scale development projects on indigenous lands was generally agreed by the Constitutional Court of Colombia.[37] The Supreme Court of Belize has made express references to free, prior and informed consent, including to article 32 of the Declaration, ultimately finding that the failure to obtain consent prior to granting concessions and permissions was unlawful.[38]

38. Certain rights, such as the right to be free from torture, are never subject to limitation by States. Even for those rights that may, theoretically, be limited by States in accordance with article 46, paragraph 2, of the Declaration, such limitation must be necessary and proportionate for the purpose of achieving the human rights objectives of the society as a whole and be non-discriminatory. As James Anaya has said, "no valid public objective is found in mere commercial purpose, private gains or revenue-raising objective".[39] Given the nature of the impact of large-scale development projects on the rights of indigenous peoples, it will often be difficult to justify such projects in view of these restrictions.

39. The burden of proof is on the State to demonstrate that the decision to pursue the activity following failure to obtain consent meets these exceptional criteria. In *Tsilhqot'in Nation*, the Supreme Court of Canada held that consent may only be overridden in strict circumstances when the government can demonstrate that: it has discharged its responsibilities in respect of the rights of the peoples concerned, including a procedural duty to consult; the action is aimed at pursuing an objective that is compelling and substantial from the perspective of the broader public and the indigenous community; the action will not substantially deprive future generations of an aboriginal group of the benefits of their land; and the principle of necessity and proportionality applies.[40]

40. Any decision to limit indigenous peoples' rights within the exceptional circumstances of article 46 must be accompanied not only by necessary safeguards, including redressing balance-of-power issues, impact assessments, mitigation measures, compensation and benefit sharing, but also by remedial measures taking into account any rights violations. The need for benefit sharing was also referred to in the *Saramaka* case, and in the *Endorois* case the African Commission on Human and Peoples' Rights stated that benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the community. Of course, in some cases, including injuries to human life, sacred sites and cultural practices, it may be difficult or impossible to put a financial valuation on rights violations. Any tensions in this regard arising within indigenous communities in the process of seeking free, prior and informed consent should be resolved by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, through their own representative institutions.

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[34] For more Canadian Supreme Court cases see Mauro Barelli, "Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018).

[35] Case T-129 of 3 March 2011.

[36] Case No. 2003/2010 R of 25 October 2010 and Barelli, "Free, Prior and Informed Consent".

[37] Cases T-769/09 of 29 October 2009, T-129 of 11 March 2011 and T-376/12 of 18 May 2012; see also Barelli, "Free, Prior and Informed Consent".

[38] See *Sarstoon Temash Institute for Indigenous Management v. Belize*, 3 April 2014.

[39] S. James Anaya and Sergio Puig, "Mitigating State sovereignty: the duty to consult with indigenous peoples", *University of Toronto Law Journal*, vol. 67, No. 4 (Fall 2017).

[40] See *Endorois* case.

41. Given that the pursuit of an activity or measure that affects indigenous peoples may result in a violation of their human rights, there should be a possibility for judicial or administrative review in the event that indigenous peoples wish to challenge that decision.[41] Such judicial or administrative review should be based on indigenous peoples' rights in the Declaration, including their rights to self-determination and effective remedies,[42] and their rights under human rights treaty law, regional and domestic law, and indigenous peoples' own laws, customs and protocols.

3. Documenting, monitoring, reviewing and recourse mechanism for free, prior and informed consent

42. Free, prior and informed consent should be documented, capturing the steps for accomplishing such consent and the essence of the agreement reached by the concerned parties, in accordance with indigenous peoples' customary norms and traditional methods of decision-making, including diverging opinions and conditional views. Guidelines or models for seeking free, prior and informed consent that are developed by either States or private actors should not prevail over indigenous peoples' own community protocols or traditional practices of capturing or recording agreements.

43. Forms of expressing consent may include, for example, treaties, agreements and contracts. Often terms are commemorated in a memorandum of agreement or understanding, or other document that is satisfactory to the indigenous peoples. Translation services must be provided where needed. Indigenous peoples must have the opportunity, moreover, to consent to each relevant aspect of a proposal or project. A generalized or limited statement of consent that, for example, does not expressly acknowledge different phases of development or the entire scope or impact of the project will not be considered to meet the standard for consent. Consent must be "ongoing" with express opportunities and requirements for review and renewal set by the parties.

44. Agreements on consent should include detailed statements of the project, its duration and the potential impacts on the indigenous peoples, including their lands, livelihoods, resources, cultures and environments (see A/HRC/24/41, para. 73); provisions for mitigation, assessment, and reimbursement for any damages to those resources; statements of indemnification of indigenous peoples for injuries caused to others on their lands; methods and venues for dispute resolution; detailed benefit-sharing arrangements (including investment, revenue sharing, employment and infrastructure); and a timetable of deliverables, including opportunities to negotiate continuing terms and licences. As a matter of best practice, any form of consent should include a detailed description of the process of notice, consultation and participation that preceded the consent.

45. As a dynamic process, the implementation of free, prior and informed consent should also be monitored and evaluated regularly. Such agreements should "include mechanisms for participatory monitoring" (ibid.). The ILO Committee of Experts on the Application of Conventions and Recommendations underlines the need for "periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned" to continue to improve their effectiveness.[43] The implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes and grievances, devised with the effective participation of indigenous peoples, including judicial review.

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[41] See statement of James Anaya at conference on "The role of the Ombudsman in Latin America: the right to prior consultation with indigenous peoples", Lima, 25 April 2013. Available from http://unsr.jamesanaya.org/statements/el-deber-estatal-de-consulta-a-los-pueblos-indigenas-dentro-del-derecho-internacional (in Spanish).

[42] See *Poma Poma v. Peru*.

[43] ILO observation 2010/81, p. 7.

IV. Review of free, prior and informed consent practices

46. The United Nations Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) are complementary and mutually supportive, and both are cited by judicial and quasi-judicial bodies. As emphasized by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, following a visit to Guatemala, "compliance with the obligations of ILO Convention 169 is not limited to the regulation of the right to consultation, but requires the application of the full range of rights affirmed in that instrument".[44]

47. The Declaration, including its free, prior and informed consent requirements, is founded on the right to self-determination, which was not necessarily at the heart of the ILO Convention when it was drafted in 1971. The *travaux preparatoires* of that Convention appear to reveal that this instrument did not specifically address the right to self-determination of indigenous peoples. As a result, the free, prior and informed consent requirement under the Declaration goes beyond the consultation requirement of the ILO Convention, at least as interpreted in the past by some States and others, such as in Latin America, where the ILO Convention is most widely ratified.[45] Yet, while the ILO Convention contains different wording from "free, prior and informed consent", elements of consent requirements are present[46] that would not preclude a substantive free, prior and informed consent-driven approach. Noting that "the protection of human rights evolves",[47] the Human Rights Committee has stated that the International Covenant on Civil and Political Rights should be interpreted as a living instrument, with the rights protected under it applied in context and in the light of present-day conditions. A similar approach applied to the ILO Convention could broaden an interpretation that some may regard as overly narrow.

48. With regard to consent, Indigenous and Tribal Peoples Convention, 1989 (No. 169) cannot be interpreted in isolation from the Declaration and other international instruments. As emphasized by ILO, differences in the legal status of the Declaration and the ILO Convention "should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples ... The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing".[48] Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz also affirms that the ILO Convention is not the only source of legal obligation with respect to consultation and free, prior and informed consent (see A/HRC/33/42/Add.1, para. 98 (b)). State obligations to consult indigenous peoples also derive from universal and regional human rights instruments of general application and the interpretative jurisprudence by supervisory mechanisms of these instruments. The interpretation of the ILO Convention could be aligned with the emerging consensus of human rights bodies on free, prior and informed consent, as imposing both procedural and substantive requirements, including the emerging consensus in international law that large-scale development projects affecting indigenous peoples will often trigger free, prior and informed consent requirements. The Special Rapporteur's view is reflected in article 35 of the ILO Convention, which states that: "the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements".

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[44] See www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=23068&LangID=E.

[45] Ibid; see also "Additional comments on Honduras, 9 June 2017" available at http://unsr.vtaulicorpuz.org/site/images/docs/special/2017-06-09-honduras-unsr-additional-observations.pdf (in Spanish).

[46] See S.J. Rombouts, "The evolution of indigenous peoples' consultation rights under the ILO and UN regimes", *Stanford Journal of International Law*, vol. 53, No. 2 (Spring 2017).

[47] See *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.7.

[48] "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", available from http://pro169.org/res/materials/en/convention169/Information%20Note%20on%20ILO%20standards%20and%20UNDRIP.doc.

49. In the private sector, free, prior and informed consent is developing into an international standard for companies operating on indigenous lands. In November 2014, First Peoples Worldwide published the "Indigenous Rights Risk Report",[49] finding that 89 per cent of the projects assessed had a high or medium risk exposure "to indigenous community opposition or violations of indigenous peoples' rights" and that Governments that disregarded their commitments to the Declaration, often with the justification that they were obstacles to development, "actually propagate volatile business environments that threaten the viability of investments in their countries". Many entities such as extractive industries are aware of these risks inherent in not soliciting free, prior and informed consent and have endeavoured to create their own free, prior and informed consent protocols.

50. There are numerous publications outlining the business case for free, prior and informed consent[50] and an increase in policy commitments to free, prior and informed consent by companies between 2012 and 2015: a report from Oxfam concluded that, "extractive industry companies are increasingly seeing the relevance of free, prior and informed consent in their operations".[51] A guide for businesses by the United Nations Global Compact equates consent with "a formal, documented social licence to operate", noting that "indigenous peoples have the right to give or withhold consent, and in some circumstances, may revoke their consent previously given".[52] Thus, for example, between 1975 and 2015 First Nations entered into formal "impact benefit agreements" in respect of 198 mining projects in Canada; however, sometimes these are agreed upon in the framework of an unwanted project to which First Nations believe they cannot object.

51. At least one third of the Sustainable Development Goal targets are linked to the rights in the Declaration[53] and a number of them have been connected to free, prior and informed consent.[54] In its Voluntary National Report 2017, Malaysia listed under Goal 15 (life on land) the aim to include indigenous and local communities in the management of natural resources and recognition of their right to give or withhold consent to proposed projects that may affect their lands. Indigenous peoples demand the recognition of free, prior and informed consent in the implementation of the Sustainable Development Goals to address their distinct circumstances with a view to ensuring that "no one is left behind".

52. Article 8 (j) of the Convention on Biological Diversity, which refers to access to traditional knowledge being subject to the approval and involvement of the holders of traditional knowledge, has been consistently interpreted as "prior and informed consent", and "free, prior and informed consent", as substantiated in the Akwé: Kon Voluntary Guidelines. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity establishes that access to traditional knowledge associated with genetic resources is based on "prior informed consent" or "approval and involvement" and on an equitable sharing of benefits. The Green Climate Fund has developed its own interpretation of free, prior and informed consent based on the Declaration. Article 29 of the Declaration is also the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides as endorsed by the International Indian Treaty Council, the Permanent Forum on Indigenous Issues and other bodies.

53. International Finance Corporation Performance Standard 7 on Indigenous Peoples (2012) conditions funding of the private sector on documenting consent in certain circumstances. The receipt of free, prior and informed consent is also one of the nine fundamental principles guiding engagement of the International Fund for Agricultural

[49] Available at https://mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf.

[50] E.g., *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Foley-Hoag LLP, July 2010); and Boreal Leadership Council, *Free, Prior and Informed Consent in Canada* (September 2012).

[51] See www.oxfam.org/en/pressroom/pressreleases/2015-07-23/global-mining-companies-improve-policies-community-consent-while.

[52] See www.unglobalcompact.org/library/541. p. 28.

[53] See http://nav.indigenousnavigator.com/images/Documents/Tools/Navigator_UNDRIP-SDGs.pdf.

[54] Goals 3, 6, 8, 9, 11 and 15.

Development with indigenous peoples. The new Environment and Social Standard 7, adopted by the World Bank in August 2016, is more aligned with a human rights-based approach to consultation than its predecessor (Operational Policy 4.10), and calls for borrowers to carry out consultations with indigenous peoples' representative bodies and organizations. This links consultation to the grass-roots indigenous organizations whose lands and resources might be adversely affected.[55] The 2013 edition of the Equator Principles, a risk management framework adopted by 80 financial institutions, expressly requires that projects with adverse impacts on indigenous peoples will require their free, prior and informed consent.

54. However, despite the recognition of free, prior and informed consent by financial institutions and the private sector, the experience of indigenous peoples shows that problems remain with its implementation. The process of seeking free, prior and informed consent is, at times, viewed as merely procedural in nature, rather than focused on human rights. It is sometimes seen as a goodwill gesture to indigenous peoples and can lead to serving third party interests rather than protecting the rights-holders interests. A debate around the first project of the Green Climate Fund in Peru in 2015, "PROFONANPE", for example, suggests a lack of understanding about the operative implications of free, prior and informed consent and issues related to full and effective participation and consultation of indigenous peoples.[56] Questions also remain on the application of free, prior and informed consent as now recognized in World Bank Performance Standard 7; in no instance should this policy lower the level of protection achieved for indigenous peoples.[57]

55. Some concerns have been raised about the many guidelines on free, prior and informed consent, including that the language used is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin. Sometimes these guidelines do not address the issue of indigenous peoples wishing to define their own consent process and to control aspects of the impact assessments. In addition, there is sometimes ambiguity in the event that consent is not forthcoming.

56. To ensure that financial institutions and the private sector can better align their policies with the rights protected in the Declaration, there is a need to develop and adopt stringent social and environmental safeguards, an indigenous peoples' policy based on international human rights standards and the Declaration, and effective oversight and compliance mechanisms and to ensure that indigenous peoples are involved throughout the process. As States are the duty bearers in implementing indigenous peoples' rights, their human rights obligations cannot be delegated to a private company or other entity (see A/HRC/12/34) and they remain responsible for any inadequacy in the process.

57. Indigenous peoples are also establishing their own protocols for free, prior and informed consent, particularly in North America and Latin America, including in Belize, Bolivia (the Plurinational State of), Brazil, Canada, Colombia, Guatemala, Honduras, Paraguay, Suriname and the United States of America. These protocols are an important tool in preparing indigenous peoples, States and other parties to engage in a consultation or free, prior and informed consent process, setting out how, when, why and whom to consult. The establishment of these protocols is an instrument of empowerment for indigenous peoples, closely linked to their rights to self-determination, participation and the development and maintenance of their own decision-making institutions (see A/HRC/EMRIP/2010/2). The right to be consulted "through their own representative institutions", mentioned in several articles relating to free, prior and informed consent, suggests the seriousness with which they should be recognized. In some cases, these

[55] Other international and regional organizations that have incorporated free, prior and informed consent into their policies and programmes on indigenous peoples include the United Nations Development Programme, the Food and Agricultural Organization of the United Nations, the Inter-American Development Bank and the European Bank for Reconstruction and Development.

[56] See www.forestpeoples.org/en/topics/un-framework-convention-climate-change-unfccc/publication/2015/green-climate-fund-and-fpic-ca.

[57] See http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy.

protocols have been recognized by the State (for example, Brazil)[58] and in others by the World Bank (Belize). In January 2018, a Federal Court in the state of Amazonas in Brazil demanded compliance with free, prior and informed consent for the Waimiri Atroari people regarding any law or development plan affecting them and regarding military activities on their lands.[59]

58. Many States have started to adopt legislation, practices and guidelines on consulting and obtaining consent. In the United States, several federal statutes require consultation, for example with respect to indigenous peoples' sacred sites, cultural patrimony and human remains. In some instances, federal agencies have adopted the Declaration[60] or otherwise entered into consensual agreements with indigenous peoples regarding these matters.[61] In Latin America, States have either enacted or are discussing enacting laws on consultation with indigenous peoples. A general consultation mechanism aimed at obtaining free, prior and informed consent has recently been established by Costa Rica.[62] Assuming that the necessary measures are taken to ensure its implementation, it can hopefully be used as a good practice for other States. There are also laws, practices or guidelines in Argentina, Canada, Chile, Ecuador, Finland, Guatemala, Mexico, Peru, the Philippines, the United States and Venezuela (the Bolivarian Republic of), among others. Some States are in the process of developing protocols on free, prior and informed consent, including the Democratic Republic of the Congo, Chile, Honduras, Paraguay and Suriname. The development of some of these laws has not been without criticism (see E/CN.4/2004/80/Add.2, A/HRC/27/52/Add.3 and A/HRC/33/42/Add.2). The Expert Mechanism has highlighted some of the requirements that such legislation should contain to ensure free, prior and informed consent in an advisory note of 2018, including adequate resources, equality and a mechanism to monitor agreements.[63] During its technical cooperation mission to Mexico City, the Expert Mechanism welcomed the inclusion of free, prior and informed consent in the City's Constitution, adopted in January 2017.

59. In Colombia, there is no law regulating free, prior and informed consent. However, between 1991 and 2012, around 156 consultations have taken place[64] pursuant to obligations laid down by the Constitutional Court (see para. 37 above). Of those, 3 out of 10 cases have been opposed by indigenous peoples,[65] and 95 per cent of projects and development activities have reached favourable outcomes.[66] A recent consultation process in Colombia, which culminated in a decree for the protection of isolated people, appears to have been a good practice, having involved dialogue with indigenous organizations and communities near isolated groups.[67] South Africa does not have a mechanism, but consultation and consent procedures have been successfully pursued through the Nagoya Protocol. In the Russian Federation, on a subnational level indigenous peoples are entitled to initiate and participate in "ethnological impact assessments" prior to decision-making on planned economic and other activity, and to access the results and recommendations; however, only international companies comply with this procedure due to the lack of regulation and legal clarity on who can represent indigenous peoples in negotiations.[68]

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[58] The state and federal government are using the Wajãpi Consultation Consent Protocol in the case of the expansion of a non-indigenous settlement neighbouring the Wajãpi indigenous land in the state of Amapá.

[59] See www.mpf.mp.br/am/sala-de-imprensa/docs/decisao-liminar-acp-waimiri-atroari-ditadura (in Portuguese).

[60] See www.achp.gov/UNdeclaration.html.

[61] See Robert J. Miller, "Consultation or consent: the United States duty to confer with American Indian governments", *North Dakota Law Review*, vol. 91 (2015).

[62] See www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1 NRTC&nValor1=1&nValor2=77482&nValor3=97132&strTipM=TC (in Spanish).

[63] Available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session11.aspx.

[64] See Garavito and Diaz submission.

[65] See Gerber submission.

[66] See Colombia national human rights institution submission.

[67] See http://opiac.org.co/los-pueblos-indigenas-de-la-amazonia-colombiana-celebramos-la-firma-del-decreto-de-proteccion-para-pueblos-indigenas-aislados/ (in Spanish).

[68] See Novikova submission (in Russian).

60. There are concerns, however, about some of the legislation and practices on free, prior and informed consent emerging around the world. These include that some consultation laws have been elaborated, quite ironically and problematically, without consultation with indigenous peoples. Additional concerns include a narrow focus on obligations under Indigenous and Tribal Peoples Convention, 1989 (No. 169) and not on the United Nations Declaration or regional or international human rights obligations; a focus on the procedural steps of a consultation process, without ensuring the genuine participation and protection of the rights of affected indigenous peoples; and a failure to address the structural concerns that violate the rights of indigenous peoples. Often, the right to consultation has not been translated into a law guaranteeing its enforcement, and the requirements of what constitutes consent are not clarified.

61. Indigenous peoples also raise concerns about "consultation fatigue"; "manufactured" consent; limits put on consultation; a lack of a common understanding of international standards relating to free, prior and informed consent; an increase in encroachments of extractive industries; and a lack of structural change to ensure free, prior and informed consent at the institutional level. These problems not only harm indigenous peoples, whose rights are often disregarded in development plans, but also lead to work-stoppages, protests, litigation and other problems with negative financial and political implications for States and industry alike.[69] For all of these reasons, the need for effective mechanisms for the operationalization of free, prior and informed consent are becoming urgent. The absence of rights-based regulatory mechanisms defining how to carry out a consultation encourages contradictory interpretations of which measures and projects need to be preceded by consultation processes and which require consent.

62. National human rights institutions play an important role in contributing towards the implementation of free, prior and informed consent. As bodies acting independently from the Government, some with an expertise in the area of indigenous peoples, they can and do fulfil many roles in the consent context. For example, in Argentina, the national human rights institution intervened in a project by ArSat Co. Telecommunications, where it had several roles, including as general coordinator of the whole process, facilitator and guarantor controlling compliance with the legal framework. Its engagement included an open consultation process that overcame three years of roadblocks. In the Bolivarian Republic of Venezuela, the national human rights institution promotes the application of prior consultation mechanisms, ensures that the right to consultation is incorporated in legislation and carries out activities promoting the right to prior consultation.

[69] In North America, failed consultations regarding development using the traditional lands and resources of indigenous peoples have led to years of costly litigation, protests and delay, even if the projects are ultimately approved. See, e.g., *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F.Supp.3d 101 (D.D.C. 2017); and *Ktunaxa Nation v. British Columbia*, 2 S.C.R. 386 (2017). In the extractive industries context, some sources indicate that work stoppages can cost upwards of $1 million per day.

Annex

Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent

1. The United Nations is an important venue for facilitating free, prior and informed consent in negotiations with States. To the extent that United Nations system organizations, including the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the World Bank, the World Health Organization and the World Intellectual Property Organization (WIPO), encounter indigenous peoples' issues, they are advised that the human rights expressed in the Declaration apply broadly in all of these settings. In particular, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources is currently in the process of negotiating several multilateral instruments on traditional knowledge, genetic resources, traditional cultural expressions and other forms of intellectual and cultural property. In the negotiation and drafting of these instruments, WIPO and Member States should reference the Declaration, and especially the norm of free, prior and informed consent, with respect to the ownership, use and protection of indigenous peoples' intellectual property and other resources.

2. States should observe a human rights approach to free, prior and informed consent, among others by promoting capacity-building for State authorities and officials, including judges and lawmakers. Because local and subnational level authorities are in many cases closer and more sensitive to indigenous issues, local officials and company employees should receive better instructions on free, prior and informed consent.

3. States should establish an appropriate regulatory mechanism or mechanisms at the national level, preferably at the constitutional or legislative level, to regulate consultations in situations where free, prior and informed consent is required or is sought as the objective of the consultation. It should include references to the Declaration. The establishment of such a mechanism itself necessitates a process of consultation with indigenous peoples in a context of trust and good faith, and should be accompanied by the development of adequate implementing institutions, employing well-trained officials and ensuring adequate funding. Such a mechanism could also act as an oversight mechanism.

4. States should engage directly with indigenous peoples. When direct negotiations between indigenous peoples and private enterprises are sought by indigenous peoples themselves, companies must exercise due diligence to ensure the adequacy of the consultation procedures. States remain responsible for any inadequacy and should ensure measures are in place to oversee and evaluate procedures undertaken by business enterprises, which could include legislation or guidelines requiring the operationalization of free, prior and informed consent and penalizing corporations for failing to comply with such consent.

5. States should establish preconditions for achieving effective free, prior and informed consent, including building trust, good faith, culturally appropriate methods of negotiation and recognition and respect for indigenous peoples' inherent rights. The process should be formal and carried out with mutual respect.

6. States should ensure that consent is always the objective of consultations, bearing in mind that in certain cases consent will be required. Consultations should start at the planning phase (i.e., prior to the State or enterprise committing to undertake a particular project or adopting a particular measure, such as the licensing of a project) so indigenous peoples can influence final decisions. The measures to be consulted on should be clear. Consultations should occur throughout the evolution of the project, entailing "constant communication between the parties"[1] and should not be confused with public hearings for environment and regulatory statutes.

[1] *Saramaka* case, para. 133.

7. States should ensure that all information, including about the potential impact of the project or measure, is provided to indigenous peoples and is presented in a manner and form that is understandable to them, culturally appropriate, in accordance with their inherent traditions and independent. If necessary, it should also be presented orally and in indigenous languages.

8. States should ensure that there is institutional capacity and political will within the organs of the State to understand the meaning of and process to seek and obtain free, prior and informed consent, including by respecting existing indigenous protocols.

9. States should ensure that indigenous peoples have the resources and capacity to effectively engage in consultation processes by supporting the development of their own institutions, while not compromising the independence of those institutions. States and the private sector should promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation, and for the smooth running of the consultations.

10. States should ensure equality throughout the process and that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations and establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice.

11. States should engage broadly with all potentially impacted indigenous peoples, consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children, youth and persons with disabilities, and bearing in mind that the governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and persons with disabilities.

12. States should ensure that the free, prior and informed consent process supports consensus building within the indigenous peoples' community, and practices that might cause division should be avoided, including when indigenous peoples are in situations of vulnerability like economic duress. Special attention should be given in this regard to indigenous peoples representing distinct sectors in the community, including dispersed communities and indigenous peoples no longer in possession of land or who have moved to urban areas.

13. States should ensure that if indigenous peoples are in voluntary isolation no activities impacting on their rights should be considered. Where interventions related to those peoples are necessary to ensure their well-being or are unavoidable the appropriate United Nations and regional safeguards should be adhered to.

14. Indigenous peoples are encouraged to establish robust representative mechanisms and laws, customs and protocols for free, prior and informed consent. At the start of a consultation process indigenous peoples should agree on and make clear how they will make a collective decision, including the threshold to indicate when there is consent (see A/HRC/21/55).

15. States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social), which should be undertaken prior to the proposal. Such impact assessments should be objective and impartial.

16. States should prevent measures or projects that may cause significant harm to indigenous people, including cumulative harm from competing land-use forms.

17. States should consult and cooperate with indigenous peoples to establish procedures to regulate, verify and monitor the consultation process, to ensure that the State consults and cooperates to obtain free, prior and informed consent, and if consent is required, that it is received.

18. States should ensure that treaties and other constructive agreements and arrangements recognizing the jurisdiction or decision-making authority of indigenous peoples are upheld and enforced.

19. States that have ratified Indigenous and Tribal Peoples Convention, 1989 (No. 169) should interpret and apply its provisions on consultation and free, prior and informed consent in accordance with other relevant standards, notably the United Nations Declaration on the Rights of Indigenous Peoples and emerging jurisprudence, including by regional human rights mechanisms.

20. States should ensure that, when relevant, indigenous peoples are provided with redress, which may include restitution, and that indigenous peoples are able to make their own decision about the form of redress best able to restore and protect their rights. This could be provided through culturally appropriate redress mechanisms, taking into account customary laws. States should not limit redress to cash compensation or arbitrarily exclude the potential for return or restoration of lands. Compensation should as far as possible take the form of lands and territories.[2]

21. States should ensure that indigenous peoples who have unwillingly lost possession of their lands, or whose lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent, are entitled to restitution or other appropriate redress (Declaration, art. 28). If direct financial benefits in the form of compensation are agreed upon for any adverse effects caused by the project, they should accrue to indigenous peoples irrespective of whether or not they own the land or resources. This may require amendments to legislation.

22. States should ensure that any consent agreements are in writing and include, inter alia, provisions on impact mitigation, compensation and an equitable distribution of the benefits from the project; joint management arrangements; grievance procedures; and a dispute regulation mechanism with equal capacity of both sides. Access to justice for claims by indigenous peoples should be guaranteed.

23. States should facilitate and support processes to draw up long-term development plans in collaboration and cooperation with indigenous peoples, including national action plans, as committed to by States in the Declaration at the World Conference on Indigenous Peoples.[3]

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[2] Committee on the Elimination of Racial Discrimination, general recommendation No. 23.

[3] See General Assembly resolution 69/2.